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Supreme Court of the United States

October Term, 1969

No. 1978 Misc.

RALPH RUSSELL,

Petitioner,

against

MARTIN P. CATHERWOOD, as Industrial Commissioner,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX.

	PAGE
Question Presented	1
Statute Involved	2
Statement of the Case	2
Reasons Why Certiorari Should Be Denied	4
Conclusion	6

CITATIONS.

Colgate-Palmolive-Peet Co. v. *National Labor Rel. Bd.*, 338 U. S. 355 (1949)	5
International Ass'n of Machinists v. *Street*, 367 U. S. 740	5
Lathrop v. *Donohue*, 367 U. S. 820 (1961)	5
Matter of Malaspina (Corsi), 309 N. Y. 413 (1956)	4
Nash v. *Florida Industrial Commission*, 389 U. S. 235 (1967)	6
N. L. R. B. v. *General Motors Corporation*, 373 U. S. 734 (1963)	5
Matter of Russell (Catherwood), 33 A. D. 2d 592, 304 N. Y. S. 2d 415 (1969)	3
Railway Employees' Department v. *Hanson*, 351 U. S. 225	4, 5
Sherbert v. *Verner*, 374 U. S. 398 (1963)	6

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Question Presented

Whether the denial by the State of New York of unemployment insurance benefits to Petitioner on the ground that he refused, without good cause, employment for which he was reasonably fitted by training and experience, violated his constitutional rights under the First Amendment when his refusal of the employment offered was based on his unwillingness to rejoin a union as required by a collective bargaining agreement.

Statute Involved

The following provision of the New York State Labor Law (Unemployment Insurance Law) is involved in this appeal:

"§ 593. Disqualification for benefits

* * *

2. Refusal of employment. No days of total unemployment shall be deemed to occur beginning with the day on which a claimant, without good cause, refuses to accept an offer of employment for which he is reasonably fitted by training and experience, including employment not subject to this article, until he has subsequently worked in employment on not less than three days in each of four weeks or earned remuneration of at least two hundred dollars. No refusal to accept employment shall be deemed without good cause nor shall it disqualify any claimant otherwise eligible to receive benefits if

(a) acceptance of such employment would either require the claimant to join a company union or would interfere with his joining or retaining membership in any labor organization; or . . ."

Statement of the Case

A. Referee's Decision

After hearings were held at which all parties were accorded a full opportunity to be heard, an Unemployment Insurance Referee held that Petitioner refused employment with his former employer because he would have been required to rejoin the union in contractual relations with the employer. He was unwilling to rejoin that union because, when previously employed, the insurance carrier failed to pay certain claims for disability insurance benefits. Petitioner never applied to the Workmen's Compensation

Board to review the action of the insurance carrier as provided by law. The Referee therefore held that Petitioner's refusal of the employment offered was without good cause (Appendix C).

B. Appeal Board's Decision

The Appeal Board adopted the findings of fact and the opinion of the Referee and affirmed his decision (Appendix B).

C. Decision of the Appellate Division

The Supreme Court, Appellate Division, Third Department affirmed the Appeal Board's Decision on the ground that there was substantial evidence to support the Board's factual finding that good cause did not exist for Petitioner's refusal of a job for which he was qualified by training and experience. The Court said:

> "The courts in this State have consistentiy upheld the board's determination that where refusing or failing to become a union member results in discharge or leaving employment such discharge or leaving is voluntary and without good cause (*Matter of Malaspina* [*Corsi*], 309 N. Y. 413; *Matter of Bernstein* [*Catherwood*], 28 A. D. 2d 759). We see no reason to differentiate between leaving or being discharged from employment and refusing to accept an offer of employment or reemployment on the basis of required union membership."

The Appellate Division further sustained the Appeal Board's finding that Petitioner's proper method of contesting his disability claim was pursuant to the relevant provision of the Workmen's Compensation Law and not by refusing employment. *Matter of Russell (Catherwood)*, 33 A. D. 2d 592, 304 N. Y. S. 2d 415 (Appendix A).

D. Proceedings in Court of Appeals

Petitioner's motion for leave to appeal to the Court of Appeals was denied by that Court (Appendix D.) Petitioner did not appeal to the Court of Appeals as of right on constitutional grounds pursuant to CPLR 5601 (b).

Reasons Why Certiorari Should Be Denied

Petitioner's contention that the denial of unemployment insurance benefits in this case violated his constitutionally protected freedom of association is without merit. Absent a showing of good cause, a refusal or failure to join a *bona fide* labor union, as required by a valid collective bargaining agreement, is no different from a failure or refusal to meet any other condition of employment.

In *Matter of Malaspina (Corsi)*, 309 N. Y. 413 the Court of Appeals said (309 N. Y. at 417, 418):

> "The applicable collective bargaining agreement required that, within 60 days after being hired, an employee must join the union, and that, if he fails to do so, the employer must discharge him. Obviously, by refusing or failing to become a member, the employee brings about his own discharge, and such action or inaction may not logically or reasonably be regarded as anything but voluntary on his part. In other words, joining the union was a condition precedent to continued employment; if, for any reason, he did not join and was discharged, he must be deemed to have quit voluntarily. If the rule were otherwise, the collective bargaining provision insisting upon union membership as prerequisite to employment would be considerably diluted, if not destroyed."

This Court has clearly held that a union shop agreement, pursuant to the Railway Labor Act, does not violate either the First or Fifth Amendment of the United States Constitution. *Railway Employees' Department* v. *Hanson*, 351

U. S. 225. See also *International Ass'n. of Machinists* v. *Street*, 367 U. S. 740.

In *N. L. R. B.* v. *General Motors Corporation*, 373 U. S. 734, this Court held that, although the Taft-Hartley Act abolished the closed shop, it permitted voluntary agreements requiring such forms of compulsory membership as the union shop or maintenance of membership. It further held that an agency shop arrangement, where not forbidden by State law, is not prohibited by the National Labor Relations Act.

In *Colgate-Palmolive-Peet Co.* v. *National Labor Rel. Bd.*, 338 U. S. 355, this Court held that a closed shop contract was valid under California law and under the National Labor Relations Act at that time. It therefore follows that there is no constitutional impediment to the closed shop and *a fortiori* to the union shop such as is involved in the present case. Petitioner, in fact, does not question the right of the employer to condition employment on Petitioner's joining the union (Petition p. 6). Actually, the employer was obliged to do so. And therefore, the Industrial Commissioner, as the administrator of the New York Unemployment Insurance Law, had the right to consider Petitioner's refusal to rejoin the union as a refusal to meet a reasonable condition of employment which, in the absence of good cause, constituted a disqualification for benefits under Labor Law, § 593 subd. 2.

In *Lathrop* v. *Donohue*, 367 U. S. 820, 81 S. Ct. 1826 (1961), this Court held that an order integrating the Wisconsin Bar and requiring attorneys to enroll in the State Bar of Wisconsin and pay dues did not infringe upon plaintiff's constitutionally protected freedom of association.

The cases cited by Petitioner are inapposite to the present appeal:

In *Sherbert* v. *Verner,* 374 U. S. 398, this Court held that a claimant for unemployment compensation could not be disqualified for refusal to accept employment which would require her to work on Saturday and, thus, violate a basic tenet of her religion.

In *Nash* v. *Florida Industrial Commission,* 389 U. S. 235, this Court invalidated the Florida "labor dispute" provision to the extent that it disqualified an unemployed claimant from benefits *solely* because she filed an unfair labor practice charge against her former employer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, April 23, 1970.

Respectfully submitted,

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